

2:17-cv-01778-JAD-DJA - May 28, 2021

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DONALD HUMES,)
) Case No. 2:17-cv-01778-JAD-DJA
Plaintiff,)
) Las Vegas, Nevada
vs.) May 28, 2021
) 9:52 a.m. - 11:00 a.m.
ACUITY, A MUTUAL INSURANCE) Courtroom 6B
COMPANY, a foreign) JURY TRIAL, DAY 4
corporation; DOES 1 through) CLOSING ARGUMENTS
10; and ROE CORPORATIONS 1)
through 10, inclusive,)
)
Defendant.)
) ***CERTIFIED COPY***

REPORTER'S **PARTIAL** TRANSCRIPT OF JURY TRIAL, DAY 4
BEFORE THE HONORABLE JENNIFER A. DORSEY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: ***CARA M. XIDIS, ESQ.***
JUSTIN W. WILSON, ESQ.
H&P LAW
8950 West Tropicana Avenue, Suite 1
Las Vegas, Nevada 89147
(702) 598-4529

(Appearances continued on page 2.)

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United States District Court
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Proceedings reported by machine shorthand. Transcript
produced by computer-aided transcription.

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1 APPEARANCES CONTINUED:

2 For the Defendant:

3 **MARISSA R. TEMPLE, ESQ.**

4 **STEPHEN H. ROGERS, ESQ.**

5 ROGERS, MASTRANGELO, CARVALHO & MITCHELL

6 700 South Third Street

7 Las Vegas, Nevada 89101

8 (702) 383-3400

9 Also Present:

10 Donald Humes, Plaintiff

11 Larry Reub, Acuity Client Representative

12 Brian Clark, Trial Technician

13 Luis Gutierrez, Trial Technician

14 * * * * *

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1 LAS VEGAS, NEVADA; FRIDAY, MAY 28, 2021; 9:52 A.M.

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3 P R O C E E D I N G S

4 **PLAINTIFF'S CLOSING ARGUMENTS**

5 **MS. XIDIS:** The term *pacta sunt servanda* is Latin,
6 which means promises should be kept. Those were the first
7 words I read in law school when I opened my contracts book,
8 and they've -- they've stuck with me. Whether it's drivers on
9 the roadway with a license who promise to drive carefully,
10 whether it's a doctor who promises to do no harm, or an
11 insurance company that we pay money to for the promise to
12 protect us, to help us when we need it, but we don't know --
13 but we don't need to go to law school to learn that promises
14 should be kept. Generally that's something we know by the
15 time we leave kindergarten.

16 Now, you have sat through hours and hours of
17 testimony about the crash, Don's injuries, and the
18 nitty-gritty of the medicine involved, but it's important to
19 take a step back and remember why we are here, what this case
20 is ultimately about.

21 Don entered into a contract with Acuity for
22 automobile coverage. In addition to the basic liability
23 coverage, he purchased extra coverage in the form of
24 underinsured motorist coverage with the express purpose of
25 protecting himself and his family. Don faithfully paid his

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1 premiums, and Acuity happily took those payments. But when
2 Don was injured and called on Acuity to fulfill its promise
3 and protect him, it turned its back on Don telling him he
4 couldn't possibly be as injured as he claims and Mr. Petty had
5 sufficient insurance to compensate him.

6 We are here because Acuity has not paid Don a cent of
7 his underinsured motorist benefits. We are here because, as
8 you have heard over and over, Acuity doesn't believe Don
9 should have treated with the doctors he did. We are here
10 because Acuity doesn't think Don's doctors had good enough
11 reasons for recommending the treatment. We are here because
12 Acuity doesn't think Don got enough benefit from the medical
13 procedures to justify them paying for any of it. This is your
14 opportunity as a jury, as the voice of our community, to send
15 a message to Acuity that, when it makes the promise of
16 protection to Don, it must honor that promise.

17 At the beginning of this trial, I presented you with
18 a checklist that, if followed, would have prevented Acuity's
19 breach of contract.

20 The first step was to confirm coverage. And as I
21 told you, that happened. And as the judge has just instructed
22 you, everyone agrees that the policy was in effect at the time
23 of the crash, and everyone agrees Don's underinsured motorist
24 coverage applies. But let's take a minute and look at the
25 coverage itself, at the contract itself.

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1 Sorry, my mouse stopped working. There we go.

2 Acuity promises we will pay all sums the insured is
3 legally entitled to recover as compensatory damages for the
4 owner or driver of an underinsured motor vehicle.

5 And let's break this down a bit. So we have: We
6 will pay -- Acuity promises to pay -- all sums -- not just
7 some of it or, in this case, none of it -- the insured -- that
8 is Don Humes -- legally entitled to recover as compensatory
9 damages -- means the damages the at-fault driver -- in this
10 case, that was Mr. Petty -- the damages he caused Don,
11 including the specific things set forth in the jury
12 instructions the judge just read to you. Mr. Humes' past and
13 future medical expenses. His past and future disability and
14 impairment. His past and future pain and suffering, mental
15 anguish, and loss of capacity to enjoy life.

16 The contract does have a couple of conditions,
17 however. For example, the policy states: We will pay only
18 after liability bonds or policies have been exhausted by
19 payment of judgments or settlements. In other words, Acuity
20 won't pay until after Mr. Petty's insurance does, and
21 Mr. Petty's insurance paid in January of 2015, more than six
22 years ago. Don took that money and paid what bills he could.
23 And as of January 30th, 2015, all of the conditions necessary
24 to obtain payment of Don's underinsured motorist benefits were
25 satisfied.

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1 Which brings us to the next step: Gather records and
2 bills. Now, this is admittedly a little broader than records
3 and bills. This encompasses the gathering of the information
4 needed to evaluate the claim to determine what you owe. And
5 you heard from Don that he provided Acuity with everything
6 they needed to evaluate his claims. You heard from Acuity's
7 hired doctor during this trial that he had all of Don's
8 medical records and bills, thousands of pages provided to him
9 by Acuity. And you did not hear from a single person from
10 Acuity, not even Mr. Reub sitting right here during the entire
11 trial, that Acuity was missing any information it needed.

12 Further, the policy requires that Don do certain
13 things that Acuity asks. For example, Acuity could have asked
14 Don to submit to a medical examination with a physician of its
15 choice, like Dr. Schifini, but it did not. Acuity simply
16 gathered and reviewed documents. Until Don filed this lawsuit
17 for breach of contract seeking your help to get Acuity to
18 honor the contract and pay what it owes, then and only then
19 did Acuity hire Dr. Schifini and ask Don questions under oath
20 in an effort to rationalize its denial after the fact.

21 The final step in the checklist is to pay what you
22 owe. Here, Acuity decided that Don had been fully compensated
23 by Mr. Petty's insurance policy, a policy that did not even
24 cover his medical expenses, and refused to pay him any of the
25 protection he had in the event he was in a crash with an

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1 underinsured motorist, like he was on April 6th, 2013.

2 Now, during its opening statement on Monday, Acuity,
3 for the very first time, acknowledged Don had not been fully
4 compensated by Mr. Petty's insurance and was owed money under
5 the policy. For the very first time in eight years. Ladies
6 and gentlemen, they admitted they should have paid him at
7 least some of his underinsured motorist benefits. They
8 admitted they breached the contract.

9 **MS. TEMPLE:** Objection, Your Honor. That's complete
10 fabrication, and that's not -- can we approach?

11 **MS. XIDIS:** I'm happy to go back and look at the
12 transcript.

13 **THE COURT:** Okay. So here's what we're going to do.
14 We're just going to disregard that last statement. We're
15 going to stick to the evidence, not the arguments.

16 **MS. XIDIS:** Sure. I'm happy to do that.

17 Now, ladies and gentlemen, this case is quite simple.
18 Don was injured in a crash with an underinsured motorist,
19 Mr. Petty. Those injuries cause him pain. His medical
20 providers recommended treatment. He followed those
21 recommendations and got the treatment. Eventually they found
22 treatment that provided relief, albeit temporary and certainly
23 not a cure. This treatment the pain always comes back. The
24 question is: How much relief does it give him and for how
25 long?

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1 All of the doctors who have met with Don, examined
2 him, and treated him, who have seen him in person and had
3 their hands on him agree that his injuries were caused by the
4 crash and are going to be with him for the rest of his life.
5 His options are limited. He can suck it up and live with it
6 or undergo painful procedures for some temporary relief.
7 They're not great options, but it's what he has.

8 Even the hired expert, Dr. Schifini, acknowledged
9 during his testimony that Don has chronic pain. He agreed
10 that the crash could cause injuries and acknowledged that Don
11 was injured in the crash. He agreed that it was reasonable
12 for Don to follow the advice of his doctors, and he agreed
13 that Don's doctors were reasonable in their examinations and
14 were simply trying to help Don address his pain.

15 That said, you sat through this trial, and you heard
16 the defense dive into the nitty-gritty of the medicine. While
17 unnecessary, we're happy to dive in and discuss the details of
18 his care as well. But let's start with all of the red
19 herrings we've encountered this week.

20 Now, the expression "red herring" comes from farmers
21 in Britain that would rub these smoked and salted, really
22 stinky fish around their property to ward off foxes and
23 protect their animals. And the purpose of this was to throw
24 the foxes off the scent, throw them off the trail, distract
25 them. And this trial has been full of red herring, and it's a

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1 good thing we have our masks. Let's go through them.

2 First we have Don's prior medical history: Gout,
3 stroke, diabetes. They went through this with so many
4 different people asking about the effects of these things on
5 Don. One thing you never heard was that any of these things
6 have anything to do with neck or back pain or any of the
7 injuries that Don claimed. Why are we wasting our time?
8 Distractions.

9 The CPAP. You heard from Don that he's not asking
10 Acuity to cover that. Why spend so much time talking about
11 something that's unrelated? Don acknowledges that he thought
12 maybe it was related. He'd never had it before, but he
13 deferred to his doctors. He's not asking Acuity to pay for
14 that.

15 Age. You heard from every single medical provider
16 about degenerative changes, and -- and each of them
17 acknowledged that every -- every adult practically, at least
18 those over 30, 40 years old, have degenerative changes in
19 their spine. And every single one of them acknowledged that
20 just because you have degenerative changes doesn't mean you
21 have pain, that there is not a correlation between the two.

22 There's no evidence that Don was in pain in the year
23 before the crash. He hadn't had any neck pain in over -- in
24 decades. And his low back pain, he had one incident that
25 lasted two weeks -- yes, two weeks, not months -- and it

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1 resolved completely. When Dr. Leon and Dr. Anderson were
2 asked about that treatment, they said it wouldn't have changed
3 their course of treatment at all. They weren't even concerned
4 about it at the point that it had resolved and never come
5 back, it wasn't -- it was a non-issue for them.

6 And think about Dr. Schifini's testimony on that as
7 well. He never once said that that 2011 treatment for low
8 back pain had anything to do with what Don's going through
9 now. Distractions.

10 There's the travel and the gaps in treatment, and I
11 anticipate that you're going to hear a lot about this soon.
12 Don is a businessman. He is a -- was a full-time RVer. He
13 traveled around the country. He spent his winters in warmer
14 climes, whether that was Florida, sometimes Texas, Arizona.
15 That was part of his life, and he treated where he was.
16 Sometimes he was able to get appointments quickly; sometimes
17 he wasn't. Sometimes he was here in Nevada on other business,
18 visiting his lawyers about this case. While he was here, he
19 got treatment.

20 No doctor will tell you that any delays between
21 appointments made his injuries worse. The only consequence of
22 not seeing doctors more often is that he was in pain, and
23 that's a choice that Don had to make based on the priorities
24 in his life at the time. Sometimes life events just get in
25 the way, and despite your best efforts, you don't make that

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1 doctor appointment or it gets rescheduled or you call and the
2 next appointment that's available you're not going to be
3 around. The travel and the gaps in treatment have nothing to
4 do with his injuries.

5 The crash speed. You heard about this with
6 Dr. Schifini, about how sometimes it was reported at 20 to
7 25 miles an hour, sometimes 30. Everyone agrees this was a
8 big crash. You saw the pictures. There's no question. And
9 if it was a 20-mile an hour crash, can it cause injury? Yeah,
10 Dr. Schifini said it absolutely could. If it's higher than
11 that, can it cause injury? Yes, Dr. Schifini said it
12 absolutely could. It doesn't matter. Distractions.

13 Loss of consciousness is the same thing. Don
14 testified yesterday that -- that he -- he believed he lost
15 consciousness, he was in and out. The records reflect that he
16 says he lost consciousness, and other times he said he's not
17 sure. The fact of the matter is it doesn't go to any of his
18 neck or back problems that he's currently experiencing, the
19 treatment that he's asking Acuity to pay for.

20 Now, he did see a neuropsychologist, Dr. Gardiner,
21 and Dr. Gardiner evaluated his cognizant deficits that his
22 friends had -- had notified him about. But Dr. Gardiner did
23 relate that to an acute brain injury that loss of
24 consciousness would be related to. He related that to the
25 chronic pain that Don was in, and I invite you to look at

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1 those records from Scovel.

2 You heard about how Dr. Leon and Dr. Anderson both
3 were treating Don on a lien, and a lien is a way that a doctor
4 can provide patient -- provide treatment to patients who a lot
5 of times, when they're involved in personal injury cases, the
6 resolution of that claim is -- is years out and -- but they
7 want to make sure that those patients have treatment, as
8 Dr. Leon testified. But the fact of the matter is both of
9 those doctors were paid back in 2015 when Don received the --
10 the settlement money from Mr. Petty. Neither of them are
11 waiting for payment. Neither of them feel like their payment
12 is contingent on your decision here. Defendant's suggestion
13 that they might be biased, it's unfounded.

14 There was also a lot of discussion about attorneys
15 and relationships in the case, the fact that Don knew
16 Dr. Crisman, that they were Masons together. So what? You
17 really think more likely than not that Dr. Crisman changed the
18 way he treated a patient because he knew him? No. You heard
19 about one phone call between Dr. Anderson and my office.
20 Dr. Anderson testified that it's normal for him to talk to
21 attorneys. He provides updates on the -- on the treatment of
22 the patient. Does he allow the attorney to dictate that
23 treatment? Of course not.

24 The neck surgery. This happened more than 20 years
25 ago. He woke up one day, had arm pain, had surgery,

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1 completely went away. Dr. Leon told you that that's
2 suggestive of a disk injury, not something we're dealing with
3 as a result of this crash. No doctor, not Dr. Leon, not
4 Dr. Anderson, and certainly not Dr. Schifini, has made any
5 indication that Don's current problems are in any way related
6 to that neck surgery. It's simply part of his past, something
7 he had and recovered from. Why are we spending so much time
8 on it? Distractions.

9 And then we already talked about the 2011
10 chiropractic treatment.

11 Now, the judge has instructed you on the burden of
12 proof in this case: The preponderance of the evidence. What
13 that means is simply this: Don has the burden of proving that
14 he was injured as a result of the crash. And imagine a scale,
15 and it's perfectly balanced. And you put a feather on one
16 side. That's the preponderance of the evidence. It's just a
17 question of what is more likely than not, even by just a
18 little bit.

19 You can apply this analysis to all of the questions
20 in this case. What is more likely, that Don was injured and
21 has been trying to resolve his pain or that he unnecessarily
22 subjects himself to procedures involving needles heated to
23 80 degrees Celsius -- that's 176 degrees Fahrenheit -- just so
24 he can get policy benefits that he already paid a premium for?
25 What's more likely than not?

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1 So what is left? Acuity's argument that Don didn't
2 have any improvement from any of these procedures? That's
3 simply not supported by the medical records. Acuity showed
4 you a whopping two medical records reporting a lack of
5 benefit. Each one was discussed by Dr. Leon and Dr. Anderson.
6 The first, a physical therapy record from September 19th,
7 2013. And as the doctors both explained, this reporting was
8 to be expected. The injection was a mere six days earlier,
9 and the anti-inflammatory effect of the medication hadn't even
10 kicked in yet. It was way too early to expect improvement.
11 Now, this record in no way suggests that the injection was not
12 successful.

13 The second is a physical therapy record from
14 June 5th, 2014. Now, when defense counsel put this record in
15 front of Dr. Anderson which shows Don said he had more pain
16 three weeks after the ablation, the nerve burning,
17 Dr. Anderson pointed out the difference between an injection
18 and an ablation. He testified that it is very common for that
19 procedure to result in increased pain before it provides
20 actual pain relief. It gets worse before it gets better. In
21 fact, Dr. Anderson told us that it can take up to eight weeks
22 for that to kick in. He specifically said that he had
23 recently changed when he asked for that pain reporting about
24 improvement because, when he asked most of his patients at six
25 weeks, past this date, they did not report very much relief at

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1 all. But when he waited until eight weeks, many of them
2 reported much, much higher levels of improvement. Again, this
3 record in no way suggests that the ablation, the nerve
4 burning, was not successful.

5 The only other thing that Acuity's doctor has relied
6 on to establish a lack of improvement is Don's deposition
7 testimony taken on May 2nd, 2018, five years after the crash.
8 He ignores all of the medical records reflecting the
9 improvement that Don obtained following the procedures;
10 records that he was provided by Acuity and testified that he
11 has reviewed; records that reflect Don's reporting close in
12 time to the procedures they reference; and he ignores the fact
13 that Don did report relief in his deposition. He just didn't
14 report as much relief as Acuity wanted.

15 Which is more likely to be the most accurate, the
16 reports Don gave his doctors contemporaneously with the
17 procedures, or his recollection five years later? Everyone
18 agrees -- except Dr. Schifini, of course -- that the nerve
19 burning procedures are incredibly painful. Dr. Anderson said
20 he hates to perform them because he doesn't like to put his
21 patients through that. No reasonable person would willingly
22 subject themselves to those procedures unless they are
23 obtaining benefit.

24 This is really a simple concept. It is cost-benefit
25 analysis. If the benefit was not greater than the cost, no

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1 one would ever do it. And this is something that Don will
2 need for the rest of his life.

3 In order to obtain that medical treatment, Don needs
4 your help enforcing his contract with Acuity. They promised
5 to protect him by compensating him for the damages he
6 sustained when injured by the negligence of an underinsured
7 motorist. That's exactly why he bought this coverage, to
8 protect himself and his family in the event that someone else
9 didn't have enough insurance to protect him. But when he made
10 a claim, they abandoned him, telling him that his injuries
11 weren't severe, that he chose the wrong doctors, that he
12 treated in the wrong states, that he has already been
13 compensated. What right does Acuity have to direct his care?

14 Don's a traveler. He's here in Nevada sometimes.
15 He's here in -- he's in Florida sometimes. He's in South
16 Dakota sometimes. The majority of his treatment was in
17 South Dakota. If he moves to California, does he have to go
18 back to South Dakota for treatment? If he moves to New York,
19 does he have to go back to South Dakota for treatment? No.

20 Acuity could have written a provision into the policy
21 limiting, saying I will only pay for treatment in
22 South Dakota. They didn't do that. There is no such
23 provision in the contract, yet Acuity wants to limit Don.
24 They tell you that him going and treating with Dr. Leon while
25 he's in Las Vegas already is unreasonable. Don's not asking

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1 Acuity to pay for the airfare. He's already here. He made an
2 appointment.

3 So let's talk about what Acuity promised to pay Don.
4 Let's talk about the numbers. I showed you this jury
5 instruction earlier. It tells you what Don is entitled to
6 recover, and it is reflected on the verdict form. These are
7 his past medical expenses totaling \$160,000 -- \$160,397.03.
8 And you'll have this back when you're doing your deliberations
9 as well. It's Exhibit 31.

10 This is a copy of the verdict form that you'll
11 receive. You will work together to come to a fair and just
12 verdict, a verdict that fully compensates Don for the damages
13 he suffered as a result of the crash from April 6th, 2013, to
14 the present and continuing into the future.

15 Now, you've heard that Mr. Petty's insurance carrier
16 paid out its policy limit to Don as a result of the crash.
17 Your job, as the jury, is to determine the total value of
18 Don's -- of the damages Don suffered as a result of the crash.
19 As the Court has instructed, you must not consider Don's
20 settlement with Mr. Petty. And based on the evidence you were
21 presented, the medical records and bills, the testimony of his
22 friends and family, the testimony of the doctors who treated
23 him, I would suggest the following as a starting point for
24 your discussions.

25 Don has past medical expenses of \$160,397.03, as I

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1 showed you. That number should go here (indicating) on that
2 top line, the value of past necessary medical care, treatment,
3 and services rendered. In other words, past medical expenses.

4 Now, Acuity has complained that some of the bills are
5 higher than they would expect. The fact of the matter is that
6 Don owes them regardless. And as Dr. Leon testified, while on
7 the higher end of charges, they are still within the range of
8 reasonable and customary charges. Don's injuries have not
9 resolved, and his doctors have testified that he will live
10 with pain for the rest of his life.

11 Now, this treatment is estimated to cost \$27,200.58 a
12 year, and this covers the treatment that he's receiving
13 routinely to his neck, mid back, and low back; the nerve
14 burning in his neck and injections in his mid back and low
15 back.

16 Dr. Leon -- now, in my opening I stated that Don had
17 a life expectancy of 16 years. Dr. Leon testified, based on
18 his analysis, that Don's life expectancy was actually 21
19 years, and I would defer to his expertise. But because I told
20 you 16 years, I'm going to tell you what that number is as
21 well. I'm going to give you a range. I would suggest that
22 the value of Don's future medical expenses is between
23 \$435,209.28 and \$571,212.18.

24 **THE COURT:** Ms. Xidis, this is the 25-minute alert
25 that you've requested.

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1 **MS. XIDIS:** Thank you, Your Honor.

2 You've heard from Don. You've heard from his
3 doctors. You know a little about his medical history. You
4 can decide whether you want to consider that 16 years that
5 he's expected to live or the 21 that Dr. Leon believes he's
6 expected to live based on his expertise and analysis.

7 Now, Don is not just entitled to medical bills,
8 whether past or future. Mr. Petty is legally responsible to
9 Don for all the damages that he owes. And Acuity, in
10 providing underinsured motorist coverage, agrees to pay
11 anything above that that Mr. Petty didn't cover, that his
12 policy didn't cover. That includes pain and suffering, mental
13 anguish, loss of capacity to enjoy life, disability, and
14 impairment. And you've heard a lot about how Don was
15 affected; a little bit from Don but mostly through his friends
16 and family, the people he works with, who see him regularly
17 and have -- have a glimpse into his life. You've also heard
18 from his medical doctors.

19 Based on that testimony and what you've heard, I
20 would suggest that, while it's difficult to place a value on
21 things like that -- you don't have a bill saying this is how
22 much your pain and suffering was -- you have to consider the
23 impact on his life. But I would suggest as a value at least
24 the cost of his medical bills. For past pain and suffering, I
25 would suggest \$160,397.03. And for future pain and suffering,

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1 mental anguish, loss of capacity to enjoy life, disability,
2 and impairment I would also suggest the amount of the medical
3 bills, the future -- the anticipated future medical expenses,
4 the \$435,209.28.

5 Now, again, there is no need to consider the
6 settlement with Mr. Petty. In fact, you have instructed --
7 been instructed that you must not consider it. You do not
8 need to make any reductions. Your job is to determine the
9 full value, 100 percent of Don's damages. This is important.
10 Don is only asking for the benefit of his bargain, the
11 protection he paid for. Thank you.

12 May I ask how much time I used?

13 **THE COURT:** You used 28.

14 **MS. XIDIS:** Thank you.

15 **MS. TEMPLE:** Ready for me?

16 **THE COURT:** I'm ready.

17 **MS. TEMPLE:** Thank you, Your Honor.

18 **DEFENSE'S CLOSING ARGUMENTS**

19 **MS. TEMPLE:** We are here to pay what we owe,
20 everything that Mr. Humes is entitled to under the policy that
21 he purchased with Acuity Insurance, and that's why we're here.

22 What's interesting is the policy of insurance and the
23 law, they're very similar; almost the same. It's not like a
24 life insurance policy. With a life insurance policy, you
25 purchase a policy, and when you pass away, the beneficiaries

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1 of that policy get that entire amount. With a car insurance
2 policy, you have to prove that the damages that you're
3 claiming and the money that you're seeking is what's actually
4 owed, just like you have to prove under the law. And what
5 does that mean? That means that you have to prove that the
6 injuries that you sustain, that you sustained them from the
7 accident. You have to prove that all of this treatment that
8 you had was necessary because of that accident. And then you
9 have to prove that all those medical bills for the treatment
10 that you had were reasonable.

11 You're going to be guided to your -- in your
12 evaluation of this claim. You've heard Dr. Schifini testify,
13 and Dr. Schifini told you how he evaluates a claim. He said
14 sometimes I get the opportunity to see a patient or a claimant
15 and I get to examine them, and sometimes I get the opportunity
16 to review all of their medical records and bills. And you
17 heard in this case that he was the only expert that had the
18 opportunity to review everything. He reviewed all of the
19 medical records. He reviewed the deposition transcripts, the
20 testimony under oath in this case of Mr. Humes, of his
21 doctors, Bruce Crisman, Trevor Anderson, and Dr. Leon, and he
22 also was the only one with the benefit of knowing what
23 treatment Mr. Humes had before this accident, what complaints
24 of pain he had before this accident.

25 As a juror, you're going to get that same opportunity

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1 that Dr. Schifini did in this case. You're going to get an
2 instruction that shows you how to evaluate the claim, and
3 that's Instruction Number 6. It will walk you through all of
4 the elements that you have to show.

5 And Ms. Xidis talked about this. In order to reach
6 damages and determine that there's damages, you have to
7 determine that there's a disability or impairment, that
8 there's pain and suffering, that there's reasonable, necessary
9 medical care, and that all of that was the result of injuries
10 sustained in this accident.

11 You'll be guided further by Jury Instruction
12 Number 3. You heard the judge read it to you. We've talked
13 about it. We talked about it at the outset of the litigation,
14 and we're talking about it again now. It's the burden of
15 proof, and the plaintiff has to prove it. The defense doesn't
16 have to disprove it. After plaintiff rested his case,
17 recognizing that he didn't meet his burden, we could have
18 rested ours without presenting one bit of evidence, but we
19 presented Dr. Schifini to further show you the evidence
20 through the defense.

21 It's important to know here that the law recognizes
22 that quantity does not equal quality. Overemphasis -- and
23 there were a number of people that came in from Mr. Humes'
24 family to talk about these claims of injury. Overemphasis on
25 the personal to the exclusion of the medical evidence really

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1 reflects an acknowledgment that the medicine just doesn't
2 support the claims here.

3 And if you're left, like I told you during the
4 opening statement, with more questions than answers, then
5 you're in the same position Acuity's in and the same position
6 they've been in for years, and it's proof that the burden has
7 not been met.

8 Sorry.

9 And that's the burden of proof instruction: A party
10 has the burden of proving any claim or defense by a
11 preponderance of the evidence. It means that you must be
12 persuaded by the evidence that the claim or defense is more
13 probably true than not true. You have to base it on all the
14 evidence, regardless of which party presented it.

15 You've heard from Dr. Schifini, and he told you there
16 is no traumatic spine injury in this case. How do we know
17 that? How does he know that? Well, he showed you the medical
18 x-rays and the MRIs in this case. He painstakingly went
19 through every one. He was the only expert that did that, and
20 he told you there's just no evidence of a traumatic injury.
21 And he showed you where you would see one, how you could see
22 one, and why you don't. Interestingly, Dr. Leon never
23 reviewed those x-rays when he came to the conclusion that all
24 of the injuries that were sustained in this accident were the
25 result of this accident, all the injuries that were being

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1 complained of.

2 Then there were injections. And he told you those
3 were non-diagnostic, and I'll tell you more during the closing
4 how we know that they were non-diagnostic. The treatment was
5 inconsistent with large gaps, and that wasn't just that
6 19-month gap we're talking about. I'll show you in a minute
7 there were gaps from the outset, large gaps in the medical
8 treatment.

9 And then there's the conduct, and Dr. Schifini talked
10 about this. We questioned plaintiff and his experts about
11 this. The conduct is inconsistent. When you can take these
12 long breaks in treatment, when you have all of this travel
13 that you're taking but you're not receiving medical care or
14 taking any pain medication. If you have a traumatic spinal
15 injury, if you're in debilitating pain, if you're rendered
16 severely disabled, it's inconsistent that you would be able to
17 travel the way he did, not treat the way Mr. Humes did.

18 And this is the calendar, and I really think that
19 this helps kind of put it into perspective. And what this
20 shows is all of the treatment that Mr. Humes had up until that
21 October 2014 gap. You will notice that in the first month,
22 after this injury that he claims was severely debilitating, he
23 had five treatments. Even despite his physical therapist
24 saying you need treatment several times a week, he didn't have
25 that treatment.

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1 July 2013, several months after the accident, just
2 one time he saw a doctor while not taking any pain medication.
3 October and November of 2013, just one visit to the doctor in
4 those two months.

5 January through May of 2014, a total of five visits
6 during that time, one time a month he saw a doctor. And then
7 we know after October 6th, 2014, for 19 months there was no
8 medical care.

9 And I know you've heard a lot about this 19-month
10 gap. It's really important in this case. But I want to put
11 it more into perspective as far as timing. Nineteen months is
12 82 weeks. That's 577 days. If we go back from now, 19
13 months, that's October 2019. Nineteen months ago none of us
14 had ever heard about COVID. That's how long Mr. Humes went
15 without any medical treatment before coming back to Acuity and
16 saying, all of this treatment I'm going to have for the rest
17 of my life starting now after that year and seven months of
18 nothing is related to that accident, and you need to pay for
19 it.

20 We talk about explanations during the course of this
21 trial for that 19-month gap, and here's the truth behind that.
22 This is the honesty behind it. Mr. Humes knew, when he came
23 to court, he had to explain that 19-month gap. We knew that.
24 Because if you are to believe that this treatment that he
25 needs for the rest of his life is because of that accident in

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1 2013, you have to have some kind of explanation as to why for
2 almost two years he could go without medical care, and the
3 first explanation was a denial. That's a denial that I got
4 when I took his deposition in September 2018.

5 "Q The requested meeting with the attorney and that
6 occasion that you were going to go down south for the
7 winter occurred on October 6th, 2014, according to the
8 record we have. From October 6th, 2014, to May 5th,
9 2016 -- so about a year and a half -- we have no records
10 of any medical treatment. Is that your recollection, that
11 no medical treatment was undergone between October 2014
12 until May 2016?

13 "A Well, I don't have exact dates. I would suspect that
14 your records are incomplete.

15 "Q Okay. Is it your recollection that you never went a
16 year and a half without undergoing any medical care?

17 "A I do not recall that at all. This has been an
18 ongoing and constant thing."

19 Later on in the deposition...

20 "Q I know that you said you recall getting treatment and
21 not having a year and a half gap between 2014 and 2016.
22 As you sit here today, do you have any recollection as to
23 what treatment you underwent during that time?

24 "A Just as needed, as necessary."

25 That deposition lasted several hours. That was

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1 Mr. Humes' opportunity to tell me everything about his claim,
2 anything that stood in the way of getting treatment. Never,
3 during that several-hour deposition, was anything mentioned
4 about the information he provided in court, about these
5 life-altering events that prohibited him and prevented him
6 from receiving medical care.

7 Next we had the testimony of Ms. Humes during trial.
8 Ms. Humes testified from her Mexico trip. She told you that
9 the day before her testimony she had been contacted by the
10 attorney and asked to figure out what happened during that
11 gap, why was there a gap. And she testified for the first
12 time listing off all of the reasons. And this was the first
13 time, after conducting all these years of discovery, that we'd
14 ever heard any of them, and I am certain that you could sense
15 my frustration during that cross-examination.

16 We have rules in Nevada, the discovery rules. It
17 requires production of information, production of documents,
18 disclosure of information. We don't have trial where you show
19 up -- you get all that information during what's called
20 discovery. That's where you learn about the claims. That's
21 where you learn about the information. So it was -- it's hard
22 to express how disorienting it is to come and hear brand-new
23 information for the first time eight years after the accident
24 and many years after that gap in treatment.

25 And Donald Humes testified as well, and you heard his

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1 testimony. He was -- he was very emotional about that
2 two-year period in his life when he claims he couldn't have
3 medical treatment because of these issues that arose. And he
4 described those 18 months in great detail. He described them
5 as the most unforgettable of his life. But he had forgotten
6 to tell me about them ever, and he had forgotten to tell any
7 of his doctors. That was the first time in eight years he'd
8 ever mentioned it.

9 And interestingly, we took the statement of -- or we
10 heard the testimony of Charles Humes, his son, and you'll
11 recall that one of the reasons that Mr. Humes and his wife
12 gave as hurdles to him getting medical treatment during that
13 two years is that he had a -- he had cancer. But you heard
14 Charles testify, when I asked about how that cancer affected
15 him and his work and his life and he said, it was just this
16 dot on his ear and he got it removed and he was back at work
17 the next day.

18 And then we have Dr. Leon's version. Dr. Leon said
19 all that treatment that I recommended, that really expensive
20 medical treatment, it worked. It worked and that's why for 19
21 months Mr. Humes didn't have to have any medical treatment.
22 He was better. But that's not the testimony in this case from
23 Mr. Humes. He says he's continued to suffer pain. And you
24 heard Dr. Schifini testify that he reviewed the records and
25 saw over and over in the medical records the notations that

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1 these injections weren't working.

2 And you heard Dr. Schifini say that he read the
3 deposition of Mr. Humes where Mr. Humes said none of these
4 work. At best they gave me 30 percent relief, and for the
5 longest period of time it was maybe a month. So Dr. Leon's
6 suggestion that this 19-month period where there was no
7 treatment is because of pain relief, it's just not supported
8 by the record. It's not even supported by Mr. Humes' own
9 testimony.

10 And the unreliability -- let me say this first.
11 Before I go into the other unreliable issues in this case, I
12 want to talk about what happened during that gap, that 2014 to
13 2016 period, because I think -- I think it's important. I
14 don't think it's a red herring. It's important for you to
15 understand that he continued to travel thousands and thousands
16 and thousands of miles back and forth from Florida, that he
17 didn't have any pain medication, but right at the time that
18 that gap began, that 19-month gap, he received the settlement
19 from the other driver. And once he received the settlement
20 from the other driver, he stopped treating for 19 months.

21 You've heard the doctors and the witnesses talk about
22 it. Dr. Schifini said, look, there's no medical or
23 commonsense explanation for this. If somebody is
24 traumatically injured in an accident, they cannot possibly go
25 19 months without medical care. Dr. Anderson didn't have an

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1 explanation either. And when Mr. Humes was asked, he never
2 disclosed a reason.

3 The unreliability doesn't end there. We talked about
4 the past medical history, and here's why it's important.
5 Regardless if it was two weeks or a month and a half, like
6 Mr. Humes testified, the way that we found out about that
7 medical care was not through disclosure by Mr. Humes. He was
8 asked five or six times during his deposition whether he had
9 prior medical treatment, and the question started out
10 generally: Did you have any back pain? Did you have any neck
11 pain? And they got more specific: Did you have any treatment
12 at Alternative Health Care with Dr. Crisman? Did you have any
13 chiropractic care within five years of this accident? And he
14 responded that he didn't. But there was an errant entry in
15 one of the medical records, and that entry said 2011. There
16 was no context to it whatsoever. In fact, I wasn't even
17 100 percent sure I was reading it correctly.

18 And so just like you heard Mr. Humes testify on the
19 stand when Ms. Xidis tried to refresh his recollection about
20 seeing this document at his deposition, the document said 2011
21 and I said, Mr. Humes, I've got this one page that says 2011.
22 You're telling me that you didn't have any issues before this
23 accident, you were in perfect health, never had any neck or
24 back pain besides that fusion many years prior? And he said,
25 oh, you're right, you're right, I did, I forgot. I had

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1 treatment with Dr. Crisman in 2011. And he said, but it's not
2 for the same thing. I said, well, Mr. Humes, can you direct
3 your attention down to the bottom, where it says low back
4 issues, would you agree with me that that's what you're
5 claiming in this case? And he said, well, it's different.

6 So I hopped on a plane and I flew to South Dakota,
7 and I talked to Dr. Crisman myself. And that's where a lot of
8 the information that you heard me questioning him about and
9 that you heard Dr. Schifini talk about came from. Those
10 records are very scarce. They're handwritten, hard to read.
11 But Mr. Crisman was open with that testimony, and you heard us
12 talking about it. There was acupuncture recommendations.
13 There were special orthotic fittings. There were x-rays.
14 There were manipulations. This treatment was not just, hey,
15 how you doing, I'm all better. And he denied it, and I had to
16 go to South Dakota to find it.

17 There's also inconsistencies throughout the medical
18 records. Your role in this case is the same role as Acuity
19 has. Okay? You-all are evaluating this the same way we have
20 had to for the past several years. You've heard for years
21 throughout the course of this litigation, it's been brought up
22 through trial, that we've had to fight for this information
23 during the course of discovery. Pre-accident medical records,
24 I had to fly to South Dakota to get them. They weren't
25 provided to me. Employment records for these claims that all

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1 of this -- these employment issues changed after the accident,
2 that new people had to be hired, I said, please give the
3 records to me. Here's an authorization. I'll get them
4 myself --

5 **MS. XIDIS:** Your Honor, Counsel's testifying. She
6 could have put someone from Acuity on the stand to talk about
7 what Acuity had or did not have. What Counsel did and what
8 she asked for, it's irrelevant.

9 **THE COURT:** Ms. Temple.

10 **MS. TEMPLE:** This came up -- this came up during his
11 examination about the authorization.

12 **THE COURT:** It's beyond the scope of the testimony
13 that was provided.

14 **MS. TEMPLE:** Okay.

15 **THE COURT:** I'm going to just direct the jury to
16 please rely on your own recollection of the testimony from the
17 witnesses.

18 **MS. TEMPLE:** Okay. Did you notice that plaintiff
19 seemingly didn't want you to see those medical records and
20 bills? Before they rested their case, they introduced into
21 evidence the photographs and the insurance contract.
22 Plaintiff's case, plaintiff's burden, plaintiff's medical
23 records and bills, and they rested without giving you any of
24 them. We had to get those in through our expert. Why is
25 that? Why didn't they want you to have those bills and

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1 records?

2 Our every effort to get information through discovery
3 is -- our every effort to get information out to you during
4 the trial is reflective of Acuity's every effort over the past
5 several years in the course of litigation to get information
6 to us. I implore you to read those records if you find them
7 necessary. If we hadn't given them to you, you wouldn't have
8 the opportunity. And you'll see how infrequently Mr. Humes
9 treated. You'll see the inconsistencies between the pain he's
10 reporting and the activities he was doing, like ATV riding.
11 You'll see that he was traveling all across the country while
12 not getting medical treatment. You'll see admissions that
13 there was no loss of consciousness, like he testified here
14 today. You'll hear that he was claiming the CPAP issue as
15 part of this litigation, and for the first time in court we
16 heard that that's no longer being claimed.

17 And then, after that period of time, that 19 months,
18 after he'd received the settlement from the other driver,
19 after all that time went by, he goes back for treatment, and
20 it's over \$100,000 in treatment. And you've heard no medical
21 or commonsense explanation as to why that is.

22 And now they want you -- they want Acuity to not only
23 pay all of those medical expenses after that long period of
24 time when he had stopped treating, but they also want us to
25 pay -- Mr. Humes wants Acuity to pay all the future medical

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1 expenses for any back or neck treatment he has for the rest of
2 his life, \$27,000 a year, half a million dollars, Acuity has
3 to pay it.

4 I want to talk about that \$160,000, and I want to
5 direct your attention to the amounts that are highlighted.
6 \$117,069 goes to Dr. Leon and Dr. Anderson. For the first
7 time in court -- we've -- we've provided you with a copy of
8 the lien. It's within the medical records. We heard that
9 Dr. Leon had been paid. I don't recall Dr. Leon testifying
10 that he had received payment yet. I don't see any evidence of
11 payment to either of them. In any event, it's worth noting
12 that 75 percent of the medical treatment, over two-thirds of
13 the medical treatment, goes to the two experts who testified
14 in this trial that all of the treatment is related to this
15 accident, that all of the injuries were sustained in this
16 accident, and that everything he needs for the rest of his
17 life to the tune of half a million dollars, it's all because
18 of this accident.

19 Your role -- we talked about it at the outset of
20 litigation. I'm going to bring it up again -- you evaluate
21 the evidence. The evidence that's submitted, the testimony of
22 the parties and the experts, and then you decide if plaintiff
23 has proved his claims. We talked about those scales of
24 justice at the beginning; the insurance company, as a
25 defendant; and you committed to the judge that you would treat

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1 the defendant, Acuity, just as you would a plaintiff. During
2 jury selection we told you, look, this is -- we recognize the
3 risk here. We're a defendant insurance company coming into a
4 courtroom to defend ourselves. And we expressed those
5 concerns to you during jury selection, and you assured us that
6 you would be fair to both sides equally. And you're here
7 because we believe that from you. It's Jury Instruction
8 Number 5, and it states: All parties are equal before the
9 law, and an insurance company is entitled to the same fair and
10 conscientious consideration by you as any party.

11 Also along those same lines we talk about sympathy,
12 and it's just natural to have sympathy. It's natural to have
13 sympathy for someone who's traveled all the way from South
14 Dakota to testify. It's natural to have sympathy for someone
15 who claims injury. But sympathy is not allowed in that jury
16 room. It can't be part of your deliberation. And that's for
17 both sides. If you feel sympathetic for Mr. Humes for the
18 reasons I just talked about, that cannot even come into the
19 deliberation. It plays no role. And just the same way for
20 Acuity. If you feel sympathy over the years and years that
21 information has been requested and not produced, you can't
22 have sympathy for them either. It goes both ways. No
23 sympathy can be considered as part of the deliberation
24 process.

25 As you go back into that deliberation room, I want

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1 you to think about something, and I think it will help you
2 arrive at a verdict. And I think it will have you -- help you
3 arrive at the verdict that Acuity is seeking in this case. If
4 there wasn't an insurance policy for Mr. Humes to collect
5 from, from which he could make a claim, would he have flown
6 back to Las Vegas multiple times for treatment at a huge
7 premium, four to five times what it costs in South Dakota,
8 with no connection here aside from his attorney and his
9 doctor? Would he be demanding meetings with doctors and
10 lawyers and demanding certain medical procedures irrespective
11 of pain or recommendation? And I would submit to you -- I
12 would ask that you review those records. There were multiple
13 calls and letters, and you'll see them throughout the file,
14 throughout the records.

15 Would Mr. Humes have gone back to treatment after a
16 year and seven months after settling with the other driver and
17 told Acuity that it's because of this accident and that they
18 need to pay? And if you believe that Mr. Humes is still in
19 pain, do you think he would be blaming all of this treatment
20 that he's having right now on this accident, or would he be
21 blaming it on his pre-accident health? The fusion, the fact
22 that he had treatment before for the exact same issues. His
23 wife testified to you that she had back surgery. She wasn't
24 in an accident. She was in this accident, but she didn't have
25 back surgery as a result of this accident. Once you answer

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1 those questions, I think you've arrived at the verdict.

2 And I want to talk about the amounts here, the
3 monetary amounts. You heard Dr. Schifini testify that there's
4 no traumatic injury in this case. All you have is a
5 sprain/strain. You would need three to four months of medical
6 care before you reach what he called maximum medical
7 improvement, and he kind of defined maximum medical
8 improvement. It's when medicine has done all it can, and then
9 at that point he -- if you're still in pain, we've done what
10 we can, medicine has done what it can, and he called that
11 maximum medical improvement. He calculated that to be
12 \$7,646.49. That's through the first three months of medical
13 treatment. And that, if you follow the law, that's the
14 conclusion that you would reach, that that's the amount that's
15 related.

16 Now, I want to talk to you about something else. My
17 client, Acuity, has offered not to stop there. Despite the
18 medical evidence, despite the law, they are willing to do
19 something -- and they have conveyed this as a courtesy to
20 Mr. Humes. And myself and Mr. Rogers, we would never counsel
21 a client away from a courtesy that they want to provide to
22 their insured. They have been willing, despite the medical
23 evidence, to consider all the way up until that 19-month gap.
24 There is no evidence that almost two years of medical
25 treatment later it's still related to the accident. So up

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1 until that 19-month period, the total medical bills were
2 \$56,003.96. And that, of course, doesn't include the pain and
3 suffering, which I'll talk about in a minute. But that's the
4 amount that Acuity said, you know what, even though our expert
5 is relying on the evidence and the law and we believe in him
6 and trust him, we're going to give Mr. Humes all the way up a
7 year and -- it's -- essentially is 19 months of treatment,
8 until that 19-month gap.

9 So we have two verdict forms that I'm going to show
10 you. The first is the one that would be calculated if you
11 want to rely on Dr. Schifini and the law and the evidence only
12 and not take into consideration the courtesy. And that's
13 \$7,649 -- I'm sorry, \$7,646.49 and \$8,000 in pain and
14 suffering. And I'm not going to do the math because I went to
15 law school because I'm not good at math, but I'll let you-all
16 do the math and come out with a number if that's the jury
17 verdict form you want to reach.

18 I want to show you the other verdict form, and this
19 is the one that Acuity is saying we're willing to pay this
20 amount. Irrespective of what's been received, this is how we
21 value the claim. This amount right here is how we value the
22 claim, and that is \$116,003.96. I did the math on this one.
23 That's \$56,003.96. That's the amount up until that almost
24 two-year gap when the settlement was reached with the other
25 driver and Mr. Humes stopped treating. \$60,000 in pain and

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1 suffering for a total of \$116,003.96. And I told you it was
2 going to be a significant amount. That's the value.

3 As far as future necessary medical treatment, I am
4 sure that you, right along with me, heard that number for the
5 first time. I didn't hear any experts testify that the amount
6 of future treatment would be half a million dollars. And I
7 certainly don't think that I heard any evidence, particularly
8 from Dr. Schifini, that all of the -- would be related to this
9 accident. This treatment that he needs all the way until he's
10 deceased essentially for the rest of his life is attributable
11 to that 2013 accident.

12 And as far as future pain and suffering, if you don't
13 award future damages, then -- and you don't believe that he's
14 going to continue to treat in the future, you don't think he's
15 still treating for accident-related injuries, you don't award
16 anything there either. And what I want to add, you heard
17 during the course of the trial, Mr. Humes has not received any
18 medical care for a year. That amount that I just told you,
19 \$116,003.96, Acuity is ready to willing to extend that to
20 Mr. Humes, and now we leave it to you and we entrust you to
21 decide.

22 **THE COURT:** Ms. Xidis.

23 **MS. XIDIS:** Yes. Court's indulgence while I get the
24 PowerPoint set up.

25 **PLAINTIFF'S REBUTTAL CLOSING ARGUMENTS**

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1 **MS. XIDIS:** Okay. So I'm not going to cover
2 everything that Ms. Temple addressed in her closing. I really
3 don't think there's -- there's much of a need to, but I do
4 want to touch on some of them.

5 First, this is exactly why we're here. Don has a
6 policy of insurance with Acuity. He was in a crash. The
7 person who cause that crash didn't have enough insurance. For
8 eight years Acuity looked at him and said you're not injured
9 enough. I don't believe you. The treatment that you're
10 getting, we don't like. You're going to Nevada. You're going
11 to Florida. You should stay home in San Diego [sic] where
12 it's cheap. You shouldn't get this treatment; it doesn't help
13 you enough. And now today, for the very first time, they tell
14 Don that they think he's entitled to something. This is why
15 we are here. Eight years.

16 They accuse him of trying to withhold records, the
17 bills and records. Did you hear anyone other than Ms. Temple
18 testify to that? Did they put Larry Reub on the stand to tell
19 you what Acuity wanted and what they didn't get? No. Because
20 Don gave them everything they needed. He gave them
21 authorizations to obtain the records. He told them who his
22 medical providers were. You have thousands of pages of
23 records. Dr. Schifini testified that he reviewed all of Don's
24 medical treatment, all of Don's medical records and bills.
25 What's missing? Nothing. You would have heard about it from

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1 a witness on the stand under oath. Ms. Temple's testimony,
2 her comments, aren't evidence.

3 Let's talk about these treatment gaps, these months
4 here and there. What difference does it make really? He's in
5 pain for longer. No doctor has said it's making him worse.
6 It's a consequence of -- of Don's choice not to take the time
7 out to go to a medical doctor. He's in Florida in the winter.
8 Sometimes it takes a long time to make those appointments.
9 He's back in South Dakota. He's -- he's a busy man. That
10 doesn't mean that his pain's not real. It doesn't mean he's
11 not dealing with it every single day. It means that he's
12 facing the consequences of those decisions not to get
13 treatment at that time. His medical bills are less as a
14 result. His pain and suffering's higher. Acuity should be
15 grateful.

16 The 19-month gap, I'm really surprised that I'm
17 talking to you about this right now. Does Acuity really think
18 that Don and Barbara and Cheryl are making up the fact that
19 his mom died during that period of time? That Barbara had
20 open-heart surgery as well as other heart surgeries? That
21 both he and Barbara suffered cancer? Not a scare. They both
22 had it. They fought it. Look at his right ear. Is he making
23 that up? I'm not going to spend any more time on that gap.

24 Let's talk about Dr. Schifini. She said that he's
25 the only doctor, the only medical provider you heard from who

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1 had reviewed everything, and listed off medical records and
2 depositions. Depositions, he's the only one who would need to
3 review the depositions because he hasn't talked to Don. He
4 doesn't know about Dr. Anderson's treatment. He hasn't talked
5 to Dr. Leon. He still doesn't know anything about
6 Dr. Bhalani. He wasn't deposed in this case. Of course he
7 reviewed the depositions. Dr. Leon and Dr. Anderson have Don
8 right here. They don't need to do that. That doesn't mean
9 anything. They had the medical records and bills.

10 And Dr. Schifini concluded that Don was at maximum
11 medical improvement, there was nothing more that could be done
12 for him. He must not have looked at those medical records
13 very hard. Because, let me tell you, there's a lot in there.
14 First, for example, this is a medical record reflecting 80 to
15 90 percent pain relief from injections and an ablation in his
16 cervical spine in December of 2016. 80 to 90 percent pain
17 relief. Let me show you where in the records it also reflects
18 improvement.

19 August 12th, 2013; August 22nd, 2013; August 27th,
20 2013; September 10th, 2013; January 8th, 2014, improvement;
21 January 9th, 2014, complete resolution of pain; May 5th, 2014,
22 improvement; June 16th, 2014, felt a little better; June 18th,
23 2014, improvement; August 25th, 2014, improvement;
24 October 6th, 2014, improvement; November 7th, 2016,
25 improvement. The pain is relieved by the nerve block, last

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1 done six months ago. His relief is lasting longer than a
2 month and a half. He said that in his deposition five years
3 later. What's more likely?

4 November 7th, 2016, 60 percent relief. 30 percent
5 from the deposition. December 14th, 2016, relieved by a nerve
6 block last done seven months ago. December 14th, 2016,
7 60 percent relief. August 23rd, 2017, the injections helped.
8 October 5th, 2017, they helped. May 16th, 2018, it has helped
9 with his lower back pain. July 11th, 2018, they helped
10 initially for about ten days. Then a couple of weeks ago he
11 started to feel better again. July 23rd, 2018, they helped
12 eventually. Just like Dr. Anderson and Dr. Leon explained, it
13 takes time for these to kick in. You can't pick a physical
14 therapy record from six days later and put it up in front of
15 you in a vacuum and say, look, it didn't help. But that's
16 what they did. That's what they've been doing for eight
17 years.

18 August 29th, 2019, they're helping. September 18th,
19 2019, helping. 70 percent that said. October 29th, 2019,
20 much better. December 6th, 2019, helped, helped, helped
21 70 percent, helped eventually but more pain for weeks.

22 The records are full of references to his
23 improvement. He is going through these treatments, and
24 they're helping. Do they get rid of his pain? Absolutely
25 not. That's why he needs them for the rest of his life. Even

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1 Dr. Schifini said that when you have chronic pain, when you're
2 at that six-month mark, more likely than not that's not going
3 away. This isn't something he can have a surgery for and fix.
4 He wishes it was that simple. His neck was that simple. His
5 low back in 2011 was six days of chiropractic therapy. Six
6 days. The idea that Dr. Leon and Dr. Anderson are
7 recommending these treatments because they -- but they aren't
8 diagnostic, there's no support for that. Look at the records.
9 They are replete with improvement. Acuity has no place, there
10 is no provision in that contract that allows them to dictate
11 what medical treatment he gets, where he gets it, how much
12 those medical providers pay. If he goes to Texas and the
13 providers charge that much, that's reasonable and customary in
14 Texas, Acuity pays for it under the policy. That's what they
15 promised. If he goes to Hawaii and treatment's even more
16 expensive, if he goes to Wyoming and it's cheaper, he gets to
17 pick where he treats, who he treats with. They don't get to
18 make those decisions for him. That is not their place. Show
19 me in the policy, look -- search that policy, find a place
20 where they get to do that.

21 Don paid them for protection. They haven't given it.
22 They get up here in this trial and they call him a liar, and
23 then after eight years they say, yeah, we should have paid you
24 something.

25 Look at that verdict form. Tell Acuity that how they

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1 treated Don is not okay.

2 (Excerpt concluded at 11:00 a.m.)

3 --o0o--

4 COURT REPORTER'S CERTIFICATE

5
6 I, AMBER M. McCLANE, Official Court Reporter, United
7 States District Court, District of Nevada, Las Vegas, Nevada,
8 do hereby certify that pursuant to 28 U.S.C. § 753 the
9 foregoing is a true, complete, and correct transcript of the
10 proceedings had in connection with the above-entitled matter.
11

12 DATED: 7/6/2021

13
14 /s/ Amber M. McClane
15 AMBER McCLANE, RPR, CRR, CCR #914
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